

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

RECEIVED

JAN 27 1993

RECEIVED

RECEIVED

RECEIVED

RECEIVED

In The Matter Of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition
Act of 1992

Rate Regulation

To: The Commission

MM docket 92-266

COMMENTS OF PRIME CABLE

Gardner F. Gillespie
Jacqueline P. Cleary

HOGAN & HARTSON
555 13th Street N.W.
Washington, D. C. 20004

Attorneys for Prime Cable

January 27, 1993

RECEIVED
JAN 27 1993

075

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

In The Matter Of)
)
Implementation of Sections of)
the Cable Television Consumer) MM docket 92-266
Protection and Competition)
Act of 1992)
)
Rate Regulation)

To: The Commission

RECEIVED
JAN 27 1992
FEDERAL COMMUNICATIONS COMMISSION

COMMENTS OF PRIME CABLE

These Comments are submitted on behalf of Prime Cable. 1/ Prime Cable operates cable systems in five different states and serves over 500,000 subscribers. The majority of Prime's subscribers are served by "stand-alone" systems in major markets. Prime has systems serving Anchorage, Houston, Chicago, and Las Vegas.

Prime's interests in this proceeding are generally congruent with the interests of other operators of large systems, and we will defer at this stage of the proceeding to those Comments submitted by NCTA and other industry spokespersons on most issues. Prime does wish to specifically address here, however, two issues. First, it is essential that the Commission recognize -- either by way of a community-specific analysis or special Alaska benchmark -- the

1/ "Prime Cable" is the name by which various related partnerships are generally known in the industry.

exceptionally high cost of living in Alaska. It is the common knowledge of anyone who has ever visited Alaska that almost everything costs more there. And because Prime's costs are higher in Alaska, so also are its cable rates. Second, to the extent that "cost of service" regulation is used as a constitutional "safety net" for any systems that do not meet all aspects of a particular benchmark, the Commission must permit an operator's entire depreciated/amortized acquisition cost to be placed in the rate base.

I. The Special Circumstances of Alaska Prices Must be Recognized.

Attached to these Comments is an analysis by InContext Inc. regarding prices in Anchorage, Alaska. 2/ The analysis, which compares Prime's basic service rate history since 1986 against the increases in rates for other, non-cable services in Anchorage since that time, 3/ shows that Prime's basic rate has increased 38.5 percent in the six years since rate deregulation. That increase falls slightly above the mean for increases in the cost of services generally in Anchorage over

2/ InContext Inc. is a political economic consulting firm. See Attachment A.

3/ Prime has owned the Anchorage system since June 30, 1989. Information prior to that date is from the records of the system.

that timeframe. On a per-channel basis, Prime's basic rate has increased only 13.3 percent, an increase close to the bottom for those services studied.

The type of comparison in Attachment A has merit for use in all major markets as an indicator of whether rates for basic and program services are unreasonable in a particular market. We would suggest that, whatever benchmarks the Commission determines to be reasonable on a national basis, it permit a showing such as that contained in Attachment A -- a comparison of cable rate increases to increases for other services since deregulation became effective in 1986 -- to justify a departure from the benchmark.

The analysis reflected in Attachment A compares price changes in a variety of services. It can be prepared for any metropolitan area, and it is the best information regarding whether a cable operator's rate history in the particular community since deregulation has been unreasonable. Prior to 1986, when rates were more readily subject to regulation, the Commission may assume that cable rates were no higher than reasonable. Had the rates been unreasonable, of course, municipal or state authorities had the general ability to cause them to be reduced. Where municipal or state authorities declined to exercise that responsibility, the Commission must assume that they either were satisfied that the rates reflected

a competitive marketplace, or that the level of the rates was similar to that to be found if the marketplace were competitive.

Prime does not, however, recommend that the community-specific analysis reflected by Attachment A be used exclusively for all markets. In some markets rates for basic service prior to 1986 may have been kept artificially low due to franchise requirements or unusually harsh regulatory procedures. We suggest that the Commission first establish benchmarks as proposed in the Notice of Proposed Rulemaking. If a system's rates meet the appropriate benchmarks, then no further analysis will be necessary. If the system's rates do not meet the benchmark, however, the system should be permitted to show by an economic analysis similar to that contained in Attachment A that its rate increases fall within a reasonable range of increases for other services in the community. Finally, if the system's rate increases are not shown to be within a reasonable range of other service price increases, the system may still rely on a cost-of-service showing as a constitutional safety net.

The 1992 Cable Act explicitly requires the Commission to refer to the history of rates, "including the relationship of such rates to changes in general consumer prices," in determining whether rates for program services are reasonable. 1992 Cable Act, § 623(c)(2)(C). We also believe that the history of cable basic rates since deregulation, in comparison

to prices for non-cable services in the community, is a reasonable proxy for estimating whether the basic rate today is at a competitive level. Especially because the sample size for communities with competitive multichannel video delivery systems is small, we suggest that the Commission permit any cable operator who believes its basic or program service rates are reasonable, even though outside a benchmark, to show that they are well within the range of rate increases for other services in the community in the period since 1986.

Any disputes between franchise authorities and cable operators on the particulars of the analysis, and on the conclusions to be drawn, should be subject to Commission review. The jurisdiction of the Commission to resolve such disputes is found in the Commission's responsibility to prescribe regulations to carry out the Act's intent that basic rates mirror rates achieved in competitive markets, 47 U.S.C. § 623(b)(1), and to reduce administrative burdens on all parties, *id.* § 623(b)(2)(A).

If the Commission permits cable operators to use a service price increase comparison as suggested above, it should not have to otherwise consider the unique situation posed by Alaska. Because Alaska cable rate increases are compared to increases in the prices for other Alaska services, the high costs of Alaska are already factored into the analysis. Similar analyses could be used to accommodate other unusual

situations where reliance on benchmark data would be unfair to the cable operator.

Should the Commission decline to accept Prime's suggestion to use such a comparison as a first-level "safety net" for both basic and program service rates, however, we suggest that the Commission establish a special benchmark for Alaska systems. The benchmark should reflect only rates in Alaska, where the cost of living is so much higher than the "lower 48."

II. When a Cost-of-Service Analysis is Used, Acquisition Costs Must Be Included in the Rate Base.

There is no question that, as assumed by the Commission, 4/ the Fifth Amendment to the Constitution prohibits confiscatory regulation of cable television rates. It is not enough that rates for non-regulated services offered by a cable operator may provide a reasonable profit for those services. Rates for regulated services must also permit recovery of a reasonable profit. 5/ So long as there is a safety-net analysis based on costs that may be applied to

4/ See NPRM at n.66.

5/ By definition, the return for competitive services will be limited and will not permit subsidization of regulated services. Although some subsidization between regulated services may be permissible, regulated services must be permitted to be priced overall to achieve a reasonable profit.

regulated services when a system does not meet the benchmark, the Constitutional requirement should be satisfied. If the Commission adopts the service price increase comparison advocated above, there should be very few instances where the more complicated cost-of-service analysis has to be employed by a cable operator seeking to justify rates above a benchmark. In any circumstances, a cost-of-service approach would only be used where the cable operator feels sufficiently strongly that its rates are justified based on costs to warrant the added complexity and expense of using that approach.

Where a cost-of-service analysis is necessary, the cable operator must be permitted to include its acquisition cost in the rate base. Traditional cost-of-service rate regulation looks first to establish a rate base -- the investment in plant used and useful to provide the service. The regulated entity is entitled to rates for its regulated services that are predicted to recover its investment and to provide a reasonable profit on its rate base, as well as to recover all legitimate expenses.

In FPC v. Hope Natural Gas Co, 320 U.S. 591 (1944), the Supreme Court adopted what has since been termed the "end

result" test of constitutional rulemaking. 6/ Rates must be set to allow the company to earn revenues sufficient to cover its expenses and capital costs, so that the company can maintain credit and attract capital. Id. at 603. In determining what capital costs to allow in the rate base, the courts generally have allowed "original cost," which has been defined as the "cost to the person who first devoted [the property] to public use." A.J.G. Priest, Principles of Public Utility Regulation 75 (1969). Another definition of "original cost" is the cost of utility plant "to the person first devoting it to the public service." M. Farris & R. Sampson, Public Utilities: Regulation, Management, & Ownership 141 (1973). 7/

Although some cases have declined to allow public utilities to include the difference between "acquisition cost" and "original cost" in their rate bases, 8/ the public

6/ See P. Garfield & W. Lovejoy, Public Utility Economics 70 (1964).

7/ See also Garfield & Lovejoy at 60 ("the 'first' original cost of the property as a public utility").

8/ See, e.g., Harrisburg Steel Corp. v. Pennsylvania Pub. Util. Comm'n, 170 Pa. Sup. Ct. 550, 109 A.2d 719 (1954). But a number of state utility commissions have permitted amortization of acquisition cost, even where the utility had been regulated prior to the acquisition. See, e.g., Board of Supervisors v. Virginia Electric & Power Co., 196 Va. 1102, 87 S.E.2d 139 (1955).

utilities at issue had always been subject to regulation and the "original cost" of their utility plant had been determined prior to the utility being acquired by another entity. When the acquiring entity made the acquisition, it understood that rates had previously been set based on the original cost of the plant. The plant had plainly been "devoted to the public service" when it was constructed, prior to the acquisition.

The same analysis does not hold for cable operators. First, of course, cable television operators are not public utilities, and their facilities have never been "devoted to the public service" in the manner of public utility facilities. But even if one were to analogize the implementation of rate regulation as similar to creation of public utility regulation, there can be no serious argument that a cable system had any "public service" characteristics prior to the enactment of the 1992 Cable Act. Many systems were acquired without any contemplation of rate regulation. And in most cases the acquisition was approved by the local franchising authority -- the entity that will now exercise rate regulation authority. Indeed, in many cases there may not even be adequate records of a system's construction costs, because no such recordkeeping has been required. It would plainly be unconstitutional to prevent a cable operator from recovering its full investment in any cable system acquired prior to the enactment of the rate regulation provisions of the Act.

III. CONCLUSION


Prime Cable requests the Commission to recognize the peculiar problems presented by its Alaska systems. Especially if the Commission adopts a series of national rate benchmarks, Prime proposes that the Commission permit it to show that its rates in Alaska are reasonable, even if in excess of a benchmark, if rate increases during deregulation are within the range of price increases for other services in the community. Prime suggests that the comparison of service price increases may be used as a first level safety net for situations which do not fit neatly within a national benchmark.

But Prime also supports the idea of a constitutional minimum cost-of-service analysis, where neither the benchmark nor the service price increase comparison justify a rate. Where cost-of-service analyses are used, the Commission must permit a cable operator to include its amortized acquisition cost, where all or a portion of a system has been acquired after construction.

Respectfully submitted,

PRIME CABLE

By


Gardner F. Gillespie
Jacqueline P. Cleary

HOGAN & HARTSON
555 13th Street N.W.
Washington, D. C. 20004
Its Attorneys

January 27, 1992

ATTACHMENT A

RATE HISTORY - ANCHORAGE

<u>Service</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1989-1992</u> <u>% of Change</u>
Broadcast Basic	8.40	8.40	8.40	8.40	10.40	23.81%
Broadcast Basic AO	9.95	6.00	6.00	6.00	6.00	-39.70%
Basic	24.25	25.95	27.95	29.95	31.95	31.75%
Basic + 1 pay	32.25	33.95	35.95	37.95/38.95	41.90	29.92%
Basic + 2 pay	42.25	43.95	45.95	45.95/46.95	48.95	15.86%
Basic + 3 pay	52.25	53.95	55.95	53.95/54.95	53.90	3.16%
Basic + 4 pay	62.25	63.95	65.95	61.95/62.95	57.90	- 6.99%
Basic + 5 pay	66.26	67.95	69.95	69.95/70.95	65.90/66.90	0.98%
Basic + 6 pay	70.25	71.95	73.95	78.95	74.90	6.62%
Basic + 7 pay	78.25	79.95	81.95	N/A	N/A	N/A
AO	11.95	9.95	9.95	9.95	9.95	-16.74%
Remote *	4.00	4.00	4.00	4.00	2.95	-26.25%
Copyright fee	N/A	N/A	0.44	0.44	0.54	N/A
Bulk pay	10.00	10.00	10.00	9.00/8.00	VARIOUS	-10.00%
Bulk AO	11.95	9.95	9.95	9.95	9.95	-16.74%
Bulk Remote	4.00	4.00	4.00	4.00	2.95	-26.25%

1993 Basic + Pay rates based on HBO and vlaue package rates. Rates may vary based on package co
 * Free remote to 3 pay and above subs (not applicable on bulk remotes)

<u>System</u>	<u>Date</u>	<u>Rate</u>	<u>#Channels</u>
Sonic	Dec. 1986	21.95	36
Sonic	April 1987	21.95	37
Sonic	April 1988	22.95	40
Sonic	Jan. 1989	24.25	44
Prime	Jan. 1990	25.95	44
Prime	Jan. 1991	27.95 + .44	45
Prime	Jan. 1992	29.95 + .44	44
Prime	Jan. 1993	31.95 + .54	46

Price Changes in Consumer Services — Anchorage, Alaska

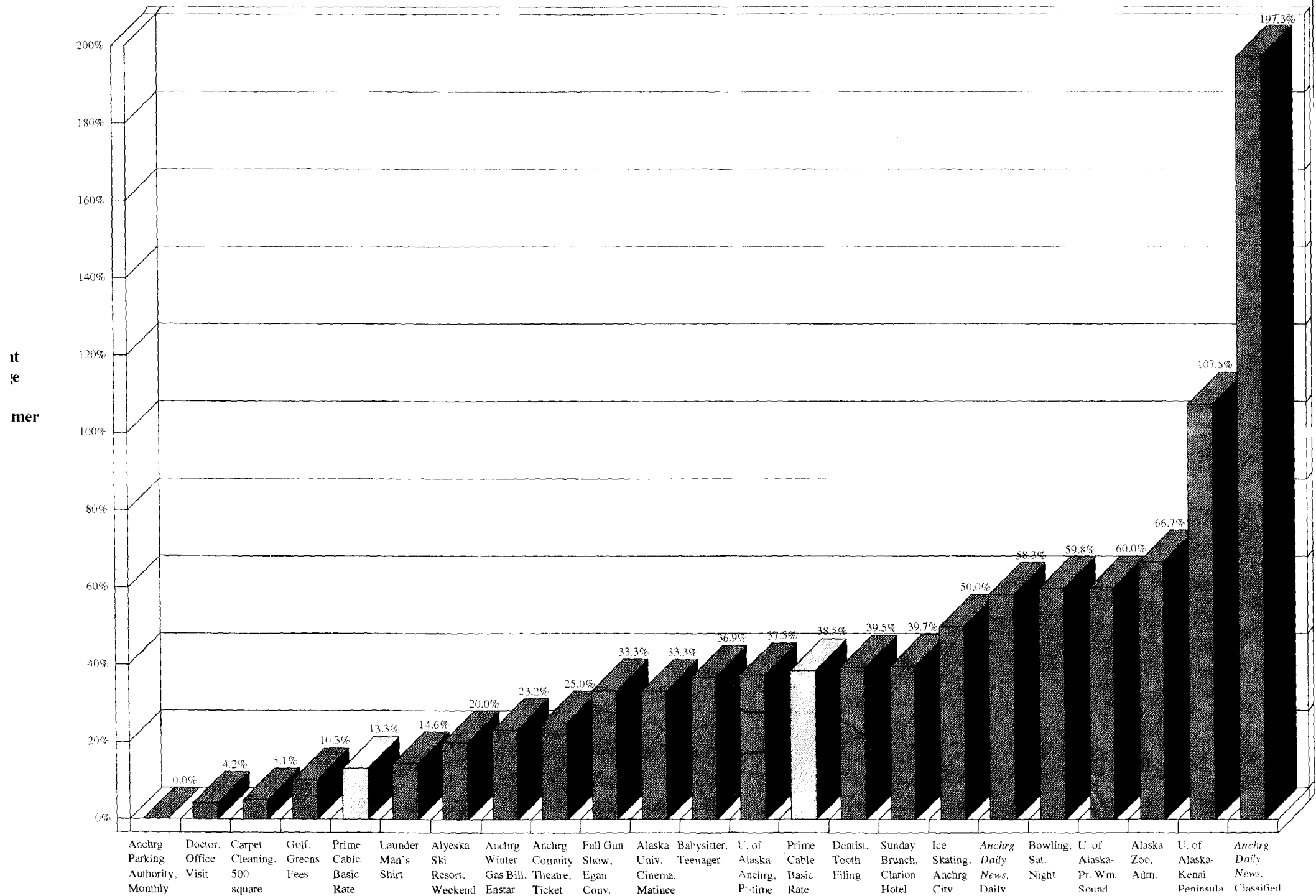
December 1986 - December 1992

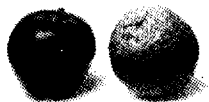
Anchorage Parking Authority, Monthly Rates	0.0%
Doctor, Office Visit	4.2%
Carpet Cleaning, 500 square feet	5.1%
Golf, Greens Fees	10.3%
Prime Cable Basic Rate Per Channel	13.3%
Launder Man's Shirt	14.6%
Alyeska Ski Resort, Weekend Lift Ticket	20.0%
Anchorage Winter Gas Bill, Enstar Natural Gas*	23.2%
Anchorage Community Theatre, Ticket	25.0%
Fall Gun Show, Egan Convention Center, Admission	33.3%
Alaska University Cinema, Matinee Admission	33.3%
Babysitter, Teenager	36.9%
U. of Alaska- Anchorage, Part-time Tuition	37.5%
Prime Cable Basic Rate	38.5%
Dentist, Tooth Filling	39.5%
Sunday Brunch, Clarion Hotel Anchorage	39.7%
Ice Skating, Anchorage City Rinks	50.0%
Anchorage Daily News, Daily Home Delivery	58.3%
Bowling, Saturday Night	59.8%
U. of Alaska-Prince William Sound, Part-time Tuition	60.0%
Alaska Zoo, Admission	66.7%
U. of Alaska-Kenai Peninsula, Part-time Tuition	107.5%
Anchorage Daily News, Classified Ad Rates	197.3%

*Winter 1985/86 - Winter 1991/92

Price Changes in Consumer Services — Anchorage, Alaska

December 1986 - December 1992





InContext[®] Inc. is a unique information firm whose business is to clarify relationships so that people can understand and act. It provides private and public sector leaders with the sophisticated and timely information analysis they need to make critical decisions, promote economic growth, and influence public policy.

InContext analyses uncover and chart the complex relationships between economics, geography and public policy. They examine politico-economic issues within any combination of market or legislative areas, from the United States as a whole down to a local voting precinct or census tract.

InContext maps information as complex as comparative price trends of brand-specific products and services within a given region, or the geographical distribution and concentrations of businesses subject to specific taxes, in simple, understandable graphics which make relationships clear, compelling, and actionable.

InContext: Information, Analysis, Action



Who We Are

William Lilley III, chairman and co-founder of **InContext** Inc., is an economic historian with broad experience in the private and public sectors. Mr. Lilley was a senior corporate official of CBS Inc. in New York. Previously, he served as Director of the U.S. Council on Wage and Price Stability and as Staff Director of the Budget Committee for the U.S. House of Representatives. He received his Ph.D. from Yale University, taught at Yale, and has written widely on both economic policy and the communications media.

Laurence J. DeFranco, president and co-founder of **InContext** Inc., has over ten years experience in the communications industry. Mr. DeFranco has co-authored several studies on the effects of economic policy on businesses. He has testified before the Copyright Royalty Tribunal and addressed advertising issues as an industry panelist. He is also president of Program Flow, Inc., a research and consulting firm in McLean, VA. Previously, he worked for CBS Inc.

William M. Diefenderfer III, executive vice president and co-founder of InContext Inc., is a lawyer with broad experience in the private and public sectors. Mr. Diefenderfer is a senior partner in the Washington law firm of Wunder, Diefenderfer, Ryan, Cannon & Thelen. Previously, he served as Deputy Director of the President's Office of Management and Budget, as Chief of Staff of the U.S. Senate Committee on Finance and as Chief Counsel of the U.S. Senate Committee on Commerce, Science and Transportation.

Diane I. Ching, vice chairman and co-founder of InContext Inc., has over fifteen years experience working in the communications industry. Ms. Ching has extensive experience with a broad range of computer and graphics systems. She is also vice president of Program Flow, Inc., a research and consulting firm in McLean, VA. Previously, she worked for Dynatech Corp. and CBS Inc.

CERTIFICATE OF SERVICE

I, the undersigned, to hereby certify that a copy of the foregoing Comments of Prime Cable was delivered by hand to the following:

Hon. James H. Quello
Commissioner
Federal Communications Commission
1919 M Street N.W. - Room 802
Washington, D. C. 20554

Hon. Sherrie P. Marshall
Commissioner
Federal Communications Commission
1919 M Street N.W. - Room 826
Washington, D. C. 20554

Hon. Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street N.W. - Room 844
Washington, D. C. 20554

Hon. Ervin S. Duggan
Commissioner
Federal Communications Commission
1919 M Street N.W. - Room 832
Washington, D. C. 20554

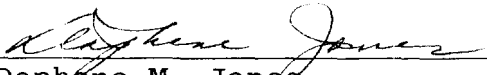
Robert Corn-Revere
Special Advisor to Commissioner Quello
Federal Communications Commission
1919 M Street N.W. - Room 802
Washington, D. C. 20554

Byron F. Marchant
Legal Advisor to Commissioner Barrett
Federal Communications Commission
1919 M Street N.W. - Room 844
Washington, D. C. 20554

Stevenson S. Kaminer
Senior Advisor to Commissioner Marshall
Federal Communications Commission
1919 M Street N.W. - Room 826
Washington, D. C. 20554

Linda L. Oliver
Legal Advisor to Commissioner Duggan
Federal Communications Commission
1919 M Street N.W. - Room 832
Washington, D. C. 20554

Robert M. Pepper, Chief
Office of Plans & Policy
Federal Communications Commission
1919 M Street N.W. - Room 822
Washington, D. C. 20554


Daphene M. Jones

8084w